STATE OF MICHIGAN

COURT OF APPEALS

FENTON BROWN,

Plaintiff-Appellant,

v

MORTON'S OF CHICAGO/DETROIT, INC. and MORTON'S OF CHICAGO,

Defendants-Appellees.

UNPUBLISHED
March 30, 1999

No. 202588
Oakland Circuit Court
LC No. 96-522049 CZ

Before: Smolenski, P.J., and McDonald and Doctoroff, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting of summary disposition in favor of defendants. We affirm.

Before this Court is an action alleging sexual harassment and race and age discrimination. Plaintiff also asserts that he was discharged in retaliation for complaining to his supervisors about sexual harassment by a coworker. Plaintiff further contends that his work environment was so tainted by discrimination and harassment that he suffered from severe emotional distress.

A motion pursuant to MCR 2.116(C)(10) tests the factual basis of a claim. *Roberson v Occupational Health Centers of America, Inc*, 220 Mich App 322, 324-325; 559 NW2d 86 (1996). After the moving party specifically identifies those issues for which it believes there is no genuine issue of disputed fact, the nonmoving party may not rely on mere allegations or denials in its pleadings but rather must set forth specific facts through affidavits or other documentary evidence to demonstrate that a genuine issue of fact exists for trial. *Id*. at 324-325; see also MCR 2.116(G)(4). In deciding the motion, the trial court must consider all of the documentary evidence in a light most favorable to the nonmoving party. *Roberson, supra*; see also MCR 2.116(G)(5). Summary disposition under MCR 2.116(C)(10) is warranted when, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Roberson, supra*. On appeal, this Court reviews de novo a trial court's decision regarding a summary disposition motion. *Id*.

First, plaintiff argues that he produced sufficient evidence that defendants' proffered legitimate reason for his termination was a pretext for discrimination. For purposes of defendants' motion for summary disposition and the present appeal, defendants concede that plaintiff has alleged a prima facie case of race and age discrimination. After the employee establishes a prima facie case of discrimination, the burden of production shifts to the employer to provide a legitimate, nondiscriminatory reason for the adverse employment decision. *Town v Michigan Bell Telephone Co*, 455 Mich 688, 695-696 (Brickley, J., with Boyle and Weaver, JJ.), 711 (Riley, J., concurring); 568 NW2d 64 (1997). Once the employer produces evidence of a nondiscriminatory reason for the adverse employment decision, the employee must submit admissible evidence to establish that the employer's nondiscriminatory reason was not the true reason behind the employer's decision and that unlawful discrimination was a motivating factor in the employer's decision. *Id*. at 697 (Brickley, J., with Boyle and Weaver, JJ.), 712, n 10, 714 (Riley, J., concurring). "The proofs offered in support of the prima facie case may be sufficient to create a triable issue of fact that the employer's stated reason is a pretext, as long as the evidence would enable a reasonable factfinder to infer that the employer's decision had a discriminatory basis." *Id*. at 697 (Brickley, J., with Boyle and Weaver, JJ.).

In this case, defendants assert that plaintiff was discharged for violating their three-strike policy. Defendants' exhibit G to their motion for summary disposition is full of written reprimands relating to plaintiff's performance, including those incidents violating the three-strike rule. Because there was documented evidence of plaintiff's violation of defendants' three-strike policy in addition to plaintiff's numerous written reprimands, defendants provided a legitimate nondiscriminatory reason for plaintiff's termination.

Although plaintiff asserts that many of his reprimands were excusable, made up, or unjustified, plaintiff has failed to produce any evidence beyond mere speculation that defendants' articulated reason for his discharge was a pretext for discrimination. Specifically, while plaintiff attempts to establish pretext by relying on the fact that two younger female servers were discharged under the same policy and then later reinstated, plaintiff has failed to show that he was similarly situated. The reinstated servers requested a special review of their mistakes by regional management and were reinstated after the special review revealed that some of their errors were invalid. However, plaintiff never made such a request. Instead, he simply refused to sign the written reprimands. In addition, although plaintiff cites various derogatory statements by coworkers relating to his age and race, none of these coworkers had authority or input with respect to defendants' decision to terminate plaintiff's employment.

In summary, reasonable minds could not differ that plaintiff's termination was for a legitimate, nondiscriminatory reason. See *Singal v General Motors Corp*, 179 Mich App 497, 504; 447 NW2d 152 (1989). The evidence clearly established that plaintiff was terminated based on his poor performance and for violation of defendants' three-strike policy. Thus, the trial court properly granted summary disposition of plaintiff's age and race discrimination claims. *Id*.

Next, plaintiff asserts that the trial court erred in ruling that he had failed to show that a statement from a tape recorded conversation was admissible. Plaintiff contends in his brief on appeal that the statement, allegedly made by one of defendants' managers, was admissible under MRE 801(d)(2)(A) or (B). However, these subrules require that the statement be made by a "party" and

defendants' manager is not a party in this case. Moreover, plaintiff has offered nothing more than his mere assertion of the speaker's identity. Because plaintiff has failed to establish a sufficient foundation showing the identity of the speaker, we have no basis for finding that the statement was admissible under MRE 801(d)(2)(D) (statement by party's agent or servant). Finally, even if we were to assume that the statement was admissible under MRE 801(d)(2)(D), the statement said nothing about race, age, sex or retaliation. In summary, we conclude that the trial court did not err in refusing to consider the statement.

Next, plaintiff contends that he produced sufficient evidence to support his claim of hostile work environment sexual harassment. We disagree.

The Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*., defines sexual harassment to mean "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature" when submission to such conduct is a factor in employment decisions or when such conduct substantially interferes with an individual's employment. See, generally, MCL 37.2103(i)(i)-(iii); MSA 3.548(103)(i)(i)-(iii). In order to establish a claim for hostile work environment sexual harassment, a plaintiff must prove the following:

> (1) the employee belonged to a protected group;
>
> (2) the employee was subjected to communication or conduct on the basis of sex;
>
> (3) the employee was subjected to unwelcome sexual conduct or communication;
>
> (4) the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and
>
> (5) respondeat superior. [*Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993).]

"The essence of a hostile work environment action is that 'one or more supervisors or coworkers create an atmosphere so infused with hostility toward members of one sex that they alter the conditions of employment for them.'" *Id*. at 385. Generally, a single incident, unless extreme, will not create an offensive, hostile, or intimidating work environment. *Id*. at 395.

In this case, plaintiff proffers evidence of two sexually harassing statements made by a coworker in Winter 1995 and a third statement approximately three weeks later by the same worker, who at that time was acting as plaintiff's supervisor. We agree with the trial court that under the circumstances of this case these three isolated comments during plaintiff's approximately seventeen months of employment simply were not so sufficiently severe or pervasive as to alter the conditions of plaintiff's employment and create an offensive, hostile or intimidating work environment. *Radtke, supra* at 394; *Chambers v Trettico, Inc*, 232 Mich App 560, 563-564; ___ NW2d ___ (1998), *Langlois v McDonald's Restaurants of Michigan, Inc*, 149 Mich App 309, 313-318; 385 NW2d 778 (1986).

Accordingly, we conclude that the trial court did not err in granting summary disposition of plaintiff's claim of hostile work environment sexual harassment.

Next, plaintiff argues that the trial court erred in dismissing his claim for unlawful retaliation.

"To establish a prima facie case of unlawful retaliation under the Civil Rights Act, a plaintiff must show (1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action." *Deflaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997); see also *Polk v Yellow Freight System, Inc*, 876 F2d 527, 531 (CA 6, 1989). Once a plaintiff establishes a prima facie case of retaliatory discharge, the burden of production shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the adverse action. *McLemore v Detroit Receiving Hosp and University Medical Center*, 196 Mich App 391, 399; 493 NW2d 441 (1992); see also *Polk, supra*. If the defendant does so, the plaintiff bears the burden of proving that the protected activity was a significant factor in the adverse employment decision. *Polk, supra*.

In this case, although plaintiff was discharged four months after he complained about a coworker's sexual harassment, there is no evidence that plaintiff was receiving good work evaluations up until that point. The performance appraisals provided in plaintiff's exhibit #2 to his brief in opposition to summary disposition do not appear to even apply to plaintiff. The names on the performance evaluations are blocked out, the hire dates are inconsistent with plaintiff's hire date, and some of the evaluations refer to the employee as "she." Because plaintiff failed to produce any evidence beyond mere speculation and allegations that defendants terminated his employment in response to his complaints of harassment, we conclude that plaintiff cannot maintain a viable claim for retaliatory discharge. Moreover, even if we were to determine that plaintiff had presented sufficient facts to support his claim of retaliatory discharge, we conclude for the reasons stated previously that plaintiff was unable to prove that defendants' articulated, legitimate reason for his termination was a mere pretext for discrimination.

Finally, plaintiff asserts that the trial court erred in determining that there was no question of fact with regard to his claim for intentional infliction of emotional distress.

The tort of intentional infliction of emotional distress, although not yet formally recognized by the Michigan Supreme Court, has been recognized by this Court. See *Nelson v Ho*, 222 Mich App 74, 88, n 6; 564 NW2d 482 (1997). To establish a prima facie case of the tort of intentional infliction of emotional distress, a plaintiff must prove four elements: (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress. *Haverbush v Powelson*, 217 Mich App 228; 233-234; 551 NW2d 206 (1996). Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. *Doe v Mills*, 212 Mich App 73, 91; 536 NW2d 824 (1995). Rather, "[l]iability for such a claim has been found only where the conduct complained of has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community." *Haverbush, supra* at 234. It is initially for the trial court to determine whether the

defendant's conduct reasonably may be regarded as so extreme and outrageous as to permit recovery. *Doe, supra* at 92. However, where reasonable persons could differ, the question is one for the jury subject to the control of the court. *Id*. at 92.

In the instant case, plaintiff alleges that some of his coworkers made disparaging remarks based on his race and age. The alleged remarks of plaintiff's coworkers, while disturbing and unenlightened, simply do not rise to the level of outrageous. As stated in *Ledsinger v Burmeister*, 114 Mich App 12, 19; 318 NW2d 558 (1982), we should be hardened to expect a certain amount of rough language and the occasional inconsiderate or unkind act in our rough-edged society. Cf. *Khalifa v Henry Ford Hospital*, 156 Mich App 485, 500; 401 NW2d 884 (1986). Moreover, plaintiff failed to create a question of fact concerning whether he was severely emotionally distressed where he testified at his deposition that he was "very, very hurt" by defendants' race, sex and age discrimination. Accordingly, we conclude that the trial court did not err in granting summary disposition with regard to plaintiff's claim for intentional infliction of emotional distress.

Affirmed.

/s/ Michael R. Smolenski
/s/ Gary R. McDonald
/s/ Martin M. Doctoroff